ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CACR 07-624

XAVIER RAY PORTIS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

February 6, 2008

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY
[NO. CR2005-4160]

HONORABLE CHRISTOPHER CHARLES PIAZZA,
JUDGE

AFFIRMED

The appellant, Xavier Ray Portis, was found guilty in a bench trial of aggravated robbery. The trial court also pronounced appellant guilty of misdemeanor theft of property, but the judgment and commitment order reflects that this conviction was "merged." Appellant raises one issue on appeal, which is that his aggravated-robbery conviction is not supported by substantial evidence. We disagree and affirm.

The Taco Bell restaurant in Little Rock where appellant was employed was robbed on July 26, 2005. Linda Williams, an assistant manager of the Taco Bell, testified that she was late for work that morning and thus did not complete some of her usual tasks, such as transferring money into a file cabinet located in the office. Appellant was also late for work that day, and Ms. Williams saw him at a gas station with some people in a white truck when she was driving to work.

While Ms. Williams was preparing food, appellant asked if she wanted him to take the trash out, which was accomplished by way of the back door. Soon thereafter, a man with a bandana covering his face grabbed Ms. Williams' collar, jerked her backwards, put a gun to her head, and demanded money that he somehow knew was kept in the file cabinet. When she told him that there was no money in the file cabinet, the man pushed her toward the safe and demanded money from it. While another man, whose face was also obscured by a bandana, unloaded money from the safe, the man who was holding the gun to her head asked for the money kept in the "top" safe. Ms. Williams told him that the top safe was on a time delay and that it would take fifteen or twenty minutes to open it. As with the filing cabinet, the man knew the locations of the safe and top safe.

The man then put Ms. Williams in the walk-in freezer. She closed the door and locked it from the inside, which prevented it from being opened from the outside. She then activated an alarm that was in the freezer.

Ms. Williams testified that appellant was standing in the front dining room and was looking out of the windows from side to side, while the man was holding a gun to her head and directing her to the various locations where money was kept. She said that the two robbers were not at all concerned about appellant's presence. When she was being put in the freezer, she said that appellant jumped over the counter and walked toward them quickly. After a time, appellant told Ms. Williams that she could come out of the freezer, but Ms. Williams yelled that she was not coming out, and she remained inside until the arrival of another manager, who had been called by the security company when she set off the alarm. Ms. Williams also testified that a painter, who was deaf, was there that morning but that he was not inside the restaurant when the armed robbery was taking place. Afterwards, appellant told her that the men had chased him.

Officer Sturdigant with the Little Rock Police Department responded to the alarm. She encountered appellant in the lobby of the restaurant, and appellant indicated to her that the alarm had been set off by the painter by mistake. Officer Sturgidant left after confirming with the night manager that the painter was authorized to be on the premises, but within seven minutes she was again dispatched to the restaurant to investigate an aggravated robbery. When she arrived, she confronted appellant and asked him why he had not told her that there had been an aggravated robbery, and she said that appellant could not give her an answer. Appellant then told her that two black males had run into the business when he was taking out the trash and that he had gone into the lobby area after dumping the trash, where he had first met her. Appellant gave the officer two different dates of birth.

Detective Tommy Hudson also spoke with appellant at the scene. Appellant told him that two men went inside the restaurant as he was taking out the trash and that he then ran away. Appellant said that he later came back to the restaurant to find Ms. Williams so that she could call the police. Appellant also gave Detective Hudson two different dates of birth. Appellant was placed under arrest.

Detective Hudson interviewed appellant at the police station after advising him of his Miranda rights. In this statement, appellant said that he was given a ride to work that morning by persons he knew only as "C" and "Brock," who were riding with a woman in a truck. He said that the men knew where he worked and that he would be taking out the trash, and they told him that they were going to rob the restaurant. Appellant stated that the men ran up and pointed a gun at him when he was taking out the trash, and that he took off running when the men went inside. He said that he went towards the front of the restaurant and asked the painter to call the police but that the painter did not seem to understand him. Appellant said that he went inside the store, saw that the men had a gun,

and laid down until it was over. Appellant said that the men told him that they "would take care of him" and that they would get in touch with him later.

In his testimony at trial, appellant said that he knew the two men from the neighborhood and that they offered him a ride on his way to work. He said that the men and the woman spoke of "hitting a lick" and that they knew he took the trash out at the restaurant. He said he did not take them seriously, but that he "talked too much" and told them where the safe was. He saw no guns or bandanas in the truck.

Appellant further testified that both men had guns when they ran towards him as he was taking out the trash. He ran and stopped at the front of the store when he saw that he was not being chased. He said he did not know that the painter was deaf and that he had tried to get the painter to call the police. Appellant claimed that he then called 911. He said that he followed the painter inside the restaurant and saw that Ms. Williams was being robbed. He hid under a table and did not see what had been done with Ms. Williams when the men left. He testified that he called her name and looked for her, checking the freezer, but that he could not find her. He thought she had been abducted.

Appellant disputed Ms. Williams' testimony that he was looking out of the windows while the robbery was taking place. He said he thought the men had been joking about robbing the restaurant, and he said that he was not participating in the robbery. He testified that he had not told Officer Sturgidant about the robbery at first because he had been afraid.

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. Ark. Code Ann. § 5-12-102(a) (Repl. 2006). A person commits aggravated robbery if he commits robbery

and is armed with a deadly weapon. Ark. Code Ann. § 5-12-103(a)(1) (Repl. 2006).

A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he or she solicits, advises, encourages or coerces the other person to commit it, or if he or she aids, agrees to aid, or attempts to aid the other person in planning or committing it. *MacKool v. State,* 365 Ark. 416, 231 S.W.3d 676 (2006). The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime are relevant facts in determining the connection of an accomplice with the crime. *Id.* There is no distinction between principals on the one hand and accomplices on the other insofar as criminal liability is concerned. *Wilson v. State,* 365 Ark. 664, 232 S.W.3d 455 (2006). When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Henson v. State,* 94 Ark. App. 163, 227 S.W.3d 450 (2006). One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Id.*

In a criminal case, whether tried by judge or jury, we review the evidence in the light most favorable to the State and affirm if the finding of guilt is supported by substantial evidence. *Huitt v. State,* 39 Ark. App. 69, 837 S.W.2d 482 (1992). Substantial evidence is evidence of adequate force and character that will compel, with reasonable certainty, a conclusion one way or the other without resorting to either speculation or conjecture. *Watson v. State,* 358 Ark. 212, 188 S.W.3d 921 (2004).

Appellant contends that there is insufficient evidence that he was an accomplice to the aggravated robbery because there was no proof that he knew the men were going to be armed during the commission of the robbery. In *Savannah v. State,* 7 Ark. App. 161, 645 S.W.2d 694 (1983), the appellant, who was charged as an accomplice to an aggravated robbery, successfully argued that he

was entitled to an instruction on the lesser-included offense of robbery because there was evidence from which a jury could conclude that he did not know that the robber had a pistol when the robbery was committed. The issue here, however, is not whether appellant was entitled to a jury instruction, but whether there is substantial evidence to support the trial court's finding that appellant knew firearms were going to be used in the commission of the robbery. *Wilson v. State,* 25 Ark. App. 126, 753 S.W.2d 287 (1988). There was evidence that the robbers discussed their plan to rob the restaurant with appellant, including gaining entry when appellant took out the trash; that appellant disclosed where money was kept; that the robbers did indeed enter the building when appellant took out the trash; that appellant saw that the robbers were armed when they entered the building; that appellant saw that they were armed during the robbery; that he acted as a lookout during the robbery; that he initially lied to the police officer by stating that no armed robbery had taken place; and that he gave varying accounts of his activities and the degree of his participation in the crime. The trier of fact was not required to believe the version of events appellant gave at trial because he is the person most interested in the outcome of the proceeding. *Champlin v. State,* 98 Ark. App. 305, ___ S.W.3d ___ (2007). We cannot say that there is no substantial evidence from which the trial court could infer that appellant knew an aggravated robbery was in the offing. Accordingly, we affirm.

Affirmed.

HART and MILLER, JJ., agree.